

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On October 19, 2010 appellant, a 44-year-old letter carrier, filed an occupational disease claim (Form CA-2), alleging that she developed lower back and cervical conditions causally related to factors of her federal employment.

On December 4, 2010 OWCP advised appellant that it required factual and medical evidence to determine whether she was eligible for compensation benefits. It requested that she submit a comprehensive report from a treating physician describing her symptoms and the medical reasons for her condition, with an opinion as to whether her claimed conditions were causally related to factors of her federal employment. OWCP afforded appellant 30 days to provide the requested evidence.

By decision dated January 14, 2011, OWCP denied the claim finding that she failed to submit medical evidence establishing a lower back or cervical condition causally related to factors of her federal employment.

By letter dated January 21, 2011, appellant, through counsel, requested a hearing before OWCP's Branch of Hearings and Review. The hearing was held on May 19, 2011.

Appellant testified at the hearing that she had worked as a mail handler for 21 years. Her job duties included lifting sacks of mail weighing 20 to 80 pounds, lifting heavy bundles of catalogs, and pushing carts weighing several thousand pounds. Appellant also noted that she intermittently drove forklifts and tow motors, which required pushing or pulling mail carts to hook them to the vehicle. She stated that she stopped work on June 10, 2010 due to arm and back pain.

In a May 5, 2011 report, received by OWCP on May 25, 2011, Dr. Bruce H. Grossinger, Board-certified in psychiatry and neurology, advised that, while appellant worked as a mail handler for 21 years, she had to do substantial physical work, including lifting, carrying, bending, pushing and pulling. He noted that she had to push heavy containers of mail, and as a consequence of performing these duties she developed radiating neck and low back complaints. Dr. Grossinger advised that appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on July 30, 2010, the results of which showed disc protrusions at L4-5 and L5-S1. He asserted that the MRI scan results correlated with a confirmatory positive electromyogram (EMG) which revealed moderate right S1 radiculopathy. Dr. Grossinger reported that appellant also underwent surgical procedures including lumbar facet medial branch blocks. Appellant received three such injections, most recently on March 30, 2011. Dr. Grossinger opined that these surgical injections were directly necessitated by her job as a mail handler for the employing establishment. He further advised that her examination had consistently been abnormal, with leg weakness, positive straight leg raising and sitting root signs, and an inability to maintain a posture for any length of time.

Dr. Grossinger advised that, with respect to her cervical spine, appellant had evidence of chronic cervical strain with muscle spasm. He noted that appellant underwent an abnormal cervical MRI scan on July 30, 2010 and that the results of this test showed straightening of

normal cervical lordosis compatible with muscle spasm. Dr. Grossinger opined that, in summary, appellant's cumulative work as a mail handler for the employing establishment directly gave rise to her neck and low back conditions causing chronic somatic dysfunction of the cervical spine, tearing and protrusion of the annuli at L4-5 and L5-S1, and nerve injury confirmed *via* EMG as noted above. He advised that appellant was being considered for lumbar surgery. Dr. Grossinger reported that the procedure would involve two-level lumbar laminectomy, discectomy, and fusion, with titanium plates and allografting. He opined that this surgical procedure was reasonable, necessary, and referable to her federal employment at the U.S. Postal Service. Dr. Grossinger concluded that appellant was totally and permanently disabled from any and all gainful employment due to progressive neck and low back injuries.

By decision dated July 29, 2011, OWCP's hearing representative set aside the January 14, 2011 decision. She found that Dr. Grossinger's May 5, 2011 report was sufficient to remand for further development of the medical evidence.

In order to determine whether appellant had a lower back or cervical condition causally related to factors of her federal employment, OWCP referred her for a second opinion examination with Dr. Robert A. Smith, Board-certified in orthopedic surgery. In a report dated September 20, 2011, Dr. Smith noted that appellant had nonspecific neck and back pain and opined that her neck and back complaints were not work related based on a normal examination and the essentially age-related normal findings noted on her MRI scan. He asserted that given the normal neurological examination findings and the lack of any compressive lesion from either the cervical or lumbar MRI scans, her reported EMG findings were clinically insignificant. Dr. Smith opined that there was no evidence of any aggravation, precipitation, or acceleration of appellant's mild preexisting degenerative disease related to her federal employment and that the disc bulges noted in her lumbar spine were preexisting and nonindustrial. He advised that there was no indication for any additional treatment due to her claimed neck and back pain and no identifiable pathology which would account for her symptoms.

By decision dated November 25, 2011, an OWCP hearing representative denied appellant's claim for a lower back or cervical condition. She found that the medical evidence, as represented by Dr. Smith's referral opinion, established that her claimed lower back and cervical conditions were not causally related to employment factors.

By letter dated December 28, 2011, appellant, through counsel, requested a hearing before OWCP's Branch of Hearings and Review.

In a January 4, 2012 report, Dr. Grossinger reiterated his previous findings and conclusions and expressed his disagreement with the opinion of Dr. Smith, the second opinion examiner. He noted that appellant had two abnormal disc bulges at L4-5 and L5-S1, without any other associated degenerative joint disease and thus there was no support from the MRI scan which suggested that the two disc bulges were degenerative in etiology. Dr. Smith further opined that appellant's cumulative employment as a mail handler for over 21 years and her duties of lifting, carrying, bending, pushing, and pulling established that her lumbar and cervical conditions were work related.

By decision dated February 13, 2012, OWCP's hearing representative set aside the January 14, 2011 decision, finding that there was a conflict in the medical evidence between the opinion of Dr. Smith, the second opinion examiner, and Dr. Grossinger, appellant's treating physician, regarding whether her claimed lower back and cervical conditions were causally related to employment factors. He remanded for referral to an impartial medical examiner to resolve the conflict in the medical evidence.

OWCP referred appellant to Dr. Andrew J. Gelman, an osteopath, for a referee medical examination. In a report dated June 27, 2012, Dr. Gelman advised that appellant's diagnoses of osteoarthritis, degenerative discopathy and lumbar facet syndrome were mostly attributable to aging and obesity. He did not consider appellant's back and neck symptomatology attributable to her employment as a mail handler.

By decision dated November 1, 2012, an OWCP hearing representative denied appellant's claim for a lower back or cervical condition. She found that the medical evidence, as represented by Dr. Smith's impartial medical opinion, established that her claimed lower back and cervical conditions were not causally related to employment factors.

By letter dated November 8, 2012, appellant, through counsel, requested a hearing before OWCP's Branch of Hearings and Review. The hearing was held on March 26, 2013.

By decision dated June 12, 2013, an OWCP hearing representative affirmed the November 1, 2012 decision. Appellant appealed to the Board. In a March 11, 2014 decision,³ the Board set aside OWCP's June 12, 2013 decision. The Board found that OWCP did not establish that Dr. Gelman was selected as an impartial medical examiner in a fair and unbiased manner. The Board therefore remanded the case to OWCP for proper selection of a referee physician. The complete facts of this case are set forth in the Board's March 11, 2014 decision and incorporated herein by reference.

OWCP referred appellant to Dr. John F. Perry for an impartial medical examination. In a July 25, 2014 report, Dr. Perry advised that, based on objective criteria, a physical examination, review of the medical records, and review of relevant medical literature, he was unable to diagnose a work-related condition. He opined that the kind of activities in which she engaged as a mail handler would not have been expected to produce her current low back and neck pain. Dr. Perry advised that the EMG findings were consistent with a degenerative process and her examination was nonspecific as he was unable to find any neurologic changes. He reported that her reflexes were physiologic, her sensation was intact, and her motor examination was normal with no atrophy of the extremities. Dr. Perry noted, however, that she was very obese and had extremely poor abdominal and general core support for her lumbar spine. He advised that none of the reports indicated disc herniation, traumatic disc protrusion, stress reactions of the bones, localized edema, or anything else to demonstrate that she had sustained an injury. Dr. Perry concluded that the only objective findings were degenerative and that there was no correlation between her employment activity and the development of these degenerative changes in her low back and neck. He opined that she did not have a work-related condition.

³ Docket No. 13-1995 (issued March 11, 2014).

In a January 19, 2015 report, Dr. Grossinger noted his disagreement with Dr. Perry's impartial medical opinion. He asserted that although Dr. Perry acknowledged that appellant sustained injuries to her neck and back he was unable to specify examination features. Dr. Grossinger opined that Dr. Perry erred by noting that the radiculopathy and the EMG findings are consistent with the degenerative process, asserting that lumbar spondylosis would not show up on an EMG test. He reiterated that appellant's job as a mail handler/equipment operator directly caused the injuries to her neck and back as well as aggravating degenerative changes in the neck and back.

By decision dated March 6, 2015, OWCP denied appellant's claim for a lower back or cervical condition. It found that the medical evidence, as represented by Dr. Perry's impartial medical opinion, established that her claimed lower back and cervical conditions were not causally related to employment factors. OWCP found that Dr. Perry's July 25, 2014 report merited the weight of an impartial medical examiner.

By letter dated March 17, 2015, appellant, through counsel, requested a hearing before OWCP's Branch of Hearings and Review. The hearing was held on September 11, 2015. Appellant did not submit any additional medical evidence.

By decision dated December 1, 2015, OWCP's hearing representative affirmed the March 6, 2015 decision. She found that Dr. Perry's report was reliable, probative, and persuasive with respect to its conclusions. OWCP's hearing representative determined that Dr. Perry's opinion was based on a proper factual and medical history and continued to constitute the weight of the medical evidence, as Dr. Perry carried the special weight of an impartial medical examiner.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish that the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence

⁴ *Supra* note 2.

⁵ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *Victor J. Woodhams*, 41 ECAB 345 (1989).

or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed, or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁷

ANALYSIS

The Board finds that OWCP properly determined, based on Dr. Perry's impartial medical report, that appellant was not entitled to compensation for a claimed lower back or neck condition.

In his July 25, 2014 report, Dr. Perry asserted that he was unable to diagnose a work-related condition based on objective criteria, her physical examination, review of the medical records and the relevant medical literature. He reported that her EMG findings were consistent with a degenerative process and that he was unable to find any neurologic changes during his examination, which was normal. Dr. Perry further advised that the kinds of activities in which she engaged as a mail handler would not have been expected to produce her current low back and neck pain. He noted that the only objective findings were degenerative and that there was no correlation between her employment activity and the development of these degenerative changes in her low back and neck. Dr. Perry concluded that appellant did not have a work-related condition.

The Board finds that Dr. Perry's impartial opinion negates causal relationship between appellant's claimed lower back and neck conditions and factors of her employment. Dr. Perry's opinion is sufficiently probative, rationalized, and based upon a proper factual background. Therefore, OWCP properly accorded Dr. Perry's opinion the special weight of an impartial medical examiner.⁸

In opposition to Dr. Perry's impartial medical opinion, appellant submitted a January 19, 2015 report of Dr. Grossinger whereby he disagreed with Dr. Perry's impartial medical opinion. He opined that Dr. Perry erred by noting that the radiculopathy and EMG findings were consistent with the degenerative process, and concluded that appellant's job as a mail handler directly caused her claimed neck and back injuries. The Board finds that as Dr. Grossinger was on one side of the conflict resolved by Dr. Perry, Dr. Grossinger's additional report is

⁷ *Id.*

⁸ Gary R. Seiber, 46 ECAB 215 (1994).

insufficient to overcome the special weight accorded to Dr. Perry's opinion, or to create a new conflict of medical opinion.⁹

Appellant subsequently requested an oral hearing but did not submit any additional medical evidence. An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.¹⁰ Causal relationship must be established by rationalized medical opinion evidence. The medical evidence of record establishes that appellant failed to meet her burden of proof to establish that she has lower back and neck conditions causally related to her employment.¹¹

On appeal counsel contends that Dr. Perry's July 25, 2014 report did not merit the special weight of an impartial medical examiner. Specifically, with regard to counsel's arguments relative to the statement of accepted facts, the Board finds that the statement of accepted facts is in compliance with FECA Procedure Manual 2.809.7. Thus, for the reasons stated above, the Board finds that OWCP properly accorded the weight to Dr. Perry. Appellant failed to meet her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof in establishing a lower back or cervical condition causally related to factors of her federal employment.

⁹ *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹⁰ *Id.*

¹¹ The Board notes that counsel argued that Dr. Glenn failed to consider the fact that Dr. Barr, OWCP's referral physician, had noted that appellant had sustained a right rotator cuff tear. OWCP has never accepted this condition, however. Dr. Glenn found that appellant's right shoulder was normal on examination, and for the reasons stated above the Board finds that OWCP properly accorded him the special weight of an impartial medical examiner and that his opinion represented the weight of the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 2, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board